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16 and CDT OXFORD LIMITED
17

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA

20 SAN FRANCISCO DIVISION

21 _____
22 14 SUNNYSIDE DEVELOPMENT
23 COMPANY LLC,
24

25 Plaintiff,

26 vs.
27 15 CAMBRIDGE DISPLAY TECHNOLOGY
28 LIMITED, CDT OXFORD LIMITED,
OPSYS LIMITED, and JOHN DOES I
through V,
29

Defendants.

No. C-08-1780-MHP

**DEFENDANT CAMBRIDGE
DISPLAY TECHNOLOGY
LIMITED'S MOTION TO DISMISS
COMPLAINT**

[Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(6)]

Date: September 8, 2008
Time: 2:00 pm
Courtroom 15, 18th Floor
Hon. Marilyn Hall Patel

21 Attached hereto:

22 1. Supporting Memorandum

23 Filed herewith:

24 1. Request for Judicial Notice
2. Foreign Authorities
3. Proposed Order
25

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NOTICE OF MOTION AND MOTION

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on Monday, September 8, 2008, at 2:00 p.m., before
 4 the Honorable Marilyn Hall Patel, United States District Judge, in Courtroom 15,
 5 18th Floor, 450 Golden Gate Avenue, San Francisco, California, defendant **CAMBRIDGE**
 6 **DISPLAY TECHNOLOGY LIMITED** (“CDT Ltd.”) will move and hereby does move,
 7 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (unless otherwise noted,
 8 all references to “Rules” herein are to the Federal Rules of Civil Procedure) to dismiss the
 9 Complaint filed by plaintiff Sunnyside Development Company LLC (“Sunnyside”) on
 10 April 3, 2008 (Dkt. 1), for failure to state a claim upon which relief can be granted. CDT
 11 Ltd. also moves pursuant to Rule 12(b)(1) to dismiss Sunnyside’s claim under section 423
 12 of the United Kingdom’s Insolvency Act 1986 for lack of subject matter jurisdiction, and
 13 pursuant to Rule 9(b) to dismiss Sunnyside’s fifth cause of action for failure to plead fraud
 14 with particularity.

15 This motion is made on the grounds that Sunnyside’s claims are barred by claim
 16 preclusion; Sunnyside’s claims are barred by issue preclusion; Sunnyside’s fraud
 17 allegations fail to state a claim; Sunnyside fails to plead fraud with particularity; Sunnyside
 18 fails to state a claim under section 238 of the UK Insolvency Act 1986; this Court does not
 19 have subject matter jurisdiction of claims under section 423 of the UK Insolvency Act
 20 1986; and certain of Sunnyside’s claims are barred by the applicable statutes of limitations.

21 This motion is based on this notice of motion and motion, the memorandum that follows,
 22 the request for judicial notice filed herewith, all pleadings and records on file in this action,
 23 and any other arguments and evidence presented to this Court at or before the hearing on
 24 this motion.

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ISSUES TO BE DECIDED

2 1. Does the doctrine of claim preclusion bar all of Sunnyside's claims?

3 *See Part III.A below.*

4 2. Does the doctrine of issue preclusion bar all of Sunnyside's claims?

5 *See Part III.B below.*

6 3. Should Sunnyside's common-law fraud claim be dismissed for failure to
7 state a claim because it does not adequately allege scienter, intent to induce reliance,
8 justifiable reliance or damages causally connected to the alleged fraud, and for failure to
9 plead with the particularity required by Rule (9b)? *See Part III.C below.*

10 4. Should Sunnyside's claim under the UK's Insolvency Act 1986 be dismissed
11 because Sunnyside is not an administrator or liquidator under section 238 of that Act, and
12 because exclusive jurisdiction of claims under section 423 of that Act is vested in the High
13 Court of England and Wales? *See Part III.D below.*

14 5. Do the applicable statutes of limitations bar all claims based on the 2002
15 transactions and all fraud and constructive trust claims based on the 2004 transactions?

16 *See Part III.E below.*

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MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION.

3 Anyone reading the complaint in this action against this Court’s orders in the prior
4 action must agree with Yogi Berra that “it’s déjà vu all over again.” See
5 <http://www.yogiberra.com/yogi-isms.html>, last accessed July 28, 2008. Without really
6 even attempting to explain itself, Sunnyside here recycles factual allegations and legal
7 theories that this Court has already found wanting in several orders—one of which
8 Sunnyside never appealed, and the other of which is currently before the Ninth Circuit.

9 All six of Sunnyside's claims here are barred by the doctrine of claim preclusion.
10 Sunnyside asserted or could have asserted all these fraud-based claims back in 2005, when
11 this Court dismissed Sunnyside's claims against CDT Ltd. with prejudice, an order that
12 Sunnyside never appealed.

13 All six of Sunnyside’s claims here also are barred by the doctrine of issue
14 preclusion. The gist of each claim is adequacy of consideration or fraudulent intent, or
15 both—but this Court resolved those issues against Sunnyside in its Rule 25(c) Order of
16 August 29, 2007, which order is currently on appeal to the Ninth Circuit, fully briefed and
17 awaiting oral argument.

18 Sunnyside's fourth claim (common-law fraud) fails to state a claim because it does
19 not allege at all (let alone with particularity) the elements of scienter, intent to induce
20 reliance, justifiable reliance and damages causally connected to the alleged fraud.

21 Sunnyside's fifth claim (under the UK Insolvency Act 1986) fails to state a claim
22 because Sunnyside is not an administrator or liquidator appointed pursuant to that Act. The
23 Court also lacks subject matter jurisdiction over portions of this claim, because the Act
24 gives exclusive jurisdiction over those portions to the High Court of England and Wales.

Finally, all six of Sunnyside's claims are barred by the statute of limitations to the extent they are based on the 2002 transactions, as are the fraud and constructive trust claims to the extent they are based on the 2004 transactions.

28 For all these reasons, this Complaint should be dismissed—with prejudice.

1 **II. STATEMENT OF THE CASE.**

2 In this action (“*Sunnyside II*”) Sunnyside purports to state six claims against
 3 defendants CDT Ltd., CDT Oxford Limited (“CDT Oxford”), and Opsys Limited
 4 (“Opsys”). The gravamen of all six is that Opsys fraudulently conveyed its assets in the
 5 United Kingdom (“UK”) to CDT Oxford and then to CDT Ltd. Compl., filed Apr. 3, 2008
 6 (Dkt. 1). If this sounds familiar, it should because we have been there before—in
 7 *Sunnyside I*.

8 **A. Procedural history of *Sunnyside I*.**

9 This is not the first time that Sunnyside has sued CDT Ltd. for fraud. *See Sunnyside*
 10 *Dev. Co. v. Opsys Ltd.*, No. C-05-553-MHP (“*Sunnyside I*”), *appeal pending*, No. 07-
 11 16773 (9th Cir.). In *Sunnyside I*, Sunnyside sued CDT Ltd. and Opsys for both fraud and
 12 breach of lease. *Sunnyside I* Dkt. 1 (Request for Judicial Notice (“RJN”) Ex. A). After first
 13 dismissing with leave to amend (RJN Ex. C), this Court then dismissed *with prejudice* both
 14 claims against CDT Ltd. and the fraud claim against Opsys. Order filed Aug. 8, 2005
 15 (*Sunnyside I* Dkt. 39; RJN Ex. F), reported as *Sunnyside Dev. Co. v. Opsys Ltd.*, No. C-05-
 16 553-MHP, 2005 WL 1876106 (N.D. Cal. Aug. 8, 2005) (“August 2005 Order”). Sunnyside
 17 did not appeal that ruling, and the time to appeal has long since run.

18 Sunnyside then moved to file a second amended complaint, seeking to name
 19 Cambridge Display Technology, Inc. (“CDT Inc.”)—Opsys’ and CDT Ltd.’s ultimate
 20 parent company at the time—as an additional defendant on a successor liability theory.
 21 *Sunnyside I* Dkt. 48 (RJN Ex. G). This Court ruled that Sunnyside’s request to join CDT
 22 Inc. was premature and denied the request without prejudice, subject to renewal if and when
 23 Opsys’ primary liability was established. *Sunnyside I* Dkt. 57, at 7 (RJN Ex. H).

24 Thereafter, Sunnyside took extensive discovery about transactions involving CDT
 25 Inc., CDT Ltd., CDT Oxford and Opsys. *See, e.g.*, *Sunnyside I* Dkt. 68-70 (Sunnyside
 26 obtained a court order compelling the production of documents relating to the 2002
 27 transaction) (RJN Ex. I-K). Sunnyside eventually obtained a jury verdict against Opsys for
 28 breach of lease. *Sunnyside I* Dkt. 166 (RJN Ex. L). Sunnyside then moved under Rules

1 25(c) and 69(a) to add CDT Inc. as a party to the action and to the judgment (the “Rule
 2 25(c) Motion”). *Sunnyside I* Dkt. 179 (RJN Ex. M). The transfers that Sunnyside alleges to
 3 be fraudulent in this action are the same transfers that Sunnyside relied upon in arguing, in
 4 its Rule 25(c) Motion in *Sunnyside I*, that CDT Inc. was liable as a successor for the
 5 judgment against Opsys.

6 While the Rule 25(c) Motion was pending, this Court entered judgment against
 7 Opsys for \$4.9 million plus costs. *Sunnyside I* Dkt. 213 (RJN Ex. T). On August 29, 2007,
 8 this Court denied Sunnyside’s Rule 25(c) Motion. Rule 25(c) Order (*Sunnyside I* Dkt. 224,
 9 RJN Ex. V), reported as *Sunnyside Dev. Co. v. Opsys Ltd.*, No. C-05-553-MHP, 2007 WL
 10 2462142 (N.D. Cal. Aug. 29, 2007). Sunnyside filed a notice of appeal from this order,
 11 which is now fully briefed and awaiting oral argument. *Sunnyside Dev. Co. v. Opsys Ltd.*,
 12 No. 07-16773 (9th Cir.).

13 Given this procedural history, it is interesting to compare what Sunnyside alleges
 14 here, in *Sunnyside II*, with what the Court has already determined in *Sunnyside I*:

15 **B. The October 2002 transactions.**

16 The Complaint in *Sunnyside II* makes these principal allegations about the October
 17 2002 transactions:

- 18 • Opsys transferred its UK assets and operations to CDT Oxford (then called Opsys
 19 UK). Compl. ¶ 37. Compare Rule 25(c) Order, RJN Ex. V at 311-12.
- 20 • CDT Inc. acquired a 16% equity interest in Opsys UK for \$2.5 million. Compl.
 21 ¶ 39. Compare Rule 25(c) Order, RJN Ex. V at 312.
- 22 • CDT Ltd. agreed to manage and fund Opsys UK’s operations in exchange for 98%
 23 of Opsys UK’s profits, if any. Compl. ¶ 24. Compare Rule 25(c) Order, RJN Ex. V
 24 at 312.
- 25 • CDT Ltd. paid Opsys \$2 million for a sublicense to Opsys’ intellectual property
 26 (“IP”). Compl. ¶ 38. Compare Rule 25(c) Order, RJN Ex. V at 312.

27 **C. The December 2004 transactions.**

28 The Complaint in *Sunnyside II* essentially glosses over the December 2004

1 transactions. See Compl. ¶¶ 46-47. The Court in *Sunnyside I*, however, dug into these
 2 transactions in some detail, noting for example that CDT Inc. acquired the equity of Opsys
 3 in exchange for 931,633 shares of newly public CDT Inc. stock. *See* Rule 25(c) Order, RJD
 4 Ex. V at 313-14.

5 **D. The May 2005 transactions.**

6 The Complaint in *Sunnyside II* makes this principal allegation about the May 2005
 7 transactions (which it concedes were planned in November 2004, before Sunnyside filed
 8 *Sunnyside I*, see Compl. ¶¶ 50-51):

9 • Opsys transferred its 84% interest in CDT Oxford to CDT Ltd. Compl. ¶¶ 25, 51.
 10 *Compare* Rule 25(c) Order, RJD Ex. V at 315, 324.

11 The Complaint in *Sunnyside II* essentially glosses over the other aspects of the May
 12 2005 transactions. *See* Compl. ¶¶ 50-56. The Court in *Sunnyside I*, however, dug into
 13 these transactions in some detail, noting:

14 • CDT Inc. transferred its 16% interest in CDT Oxford to CDT Ltd. Rule 25(c)
 15 Order, RJD Ex. V at 315, 324.
 16 • CDT Inc. transferred its 100% interest in Opsys to CDT Ltd. Rule 25(c) Order, RJD
 17 Ex. V at 315, 324.

18 Thus, the Rule 25(c) Order in *Sunnyside I* deals with all the principal allegations of
 19 the Complaint in *Sunnyside II*—and then some.

20 **III. ARGUMENT.**

21 **A. Sunnyside's claims are barred by the doctrine of claim preclusion.**

22 This Court dismissed with prejudice Sunnyside's fraud claims against CDT Ltd. in
 23 *Sunnyside I*. August 2005 Order (*Sunnyside I* Dkt. 39; RJD Ex. F). Under the doctrine of
 24 claim preclusion, this order bars re-litigation of Sunnyside's fraud claims here. Because all
 25 Sunnyside's causes of action sound in fraud, all its claims are barred.

26 In a diversity action, the forum state's law applies to determine the preclusive effect
 27 of a previous judgment. *Bates v. Union Oil Co. of Cal.*, 944 F.2d 647, 649 (9th Cir. 1991).
 28 Under California law, the preclusive effect of a prior federal judgment is governed by

1 federal law. *See id.* (citing *Levy v. Cohen*, 19 Cal. 3d 165, 172-73 (1977)); *Jacobs v. CBS*
 2 *Broadcasting Inc.*, 291 F.3d 1173, 1177 (9th Cir. 2002) (citing *Younger v. Jensen*, 26 Cal.
 3 3d 397, 411 (1980)). Claim preclusion applies under federal law where there is (1) identity
 4 or privity between the parties, (2) a final judgment on the merits and (3) identity of claims.
 5 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064,
 6 1077 (9th Cir. 2003) (citations omitted). All three elements are satisfied here.

7 **1. Identity or privity between the parties.**

8 This is easy. Sunnyside sued CDT Ltd in *Sunnyside I*; Sunnyside is now suing CDT
 9 Ltd. in *Sunnyside II*. CDT Oxford was not a party to *Sunnyside I* but it is in privity with
 10 CDT Ltd. *See Tahoe-Sierra*, 322 F.3d at 1081 (privity may exist “when there is sufficient
 11 commonality of interest”) (citation omitted). CDT Oxford has the same interest here that
 12 CDT Ltd. had in *Sunnyside I* in rebutting Sunnyside’s claims that the transfer of Opsys’
 13 assets was fraudulent. Indeed, Sunnyside has now brought the same claims against both
 14 CDT Ltd. and CDT Oxford. Moreover, this is not a case where res judicata is applied
 15 offensively, by a plaintiff against a defendant or its privy. Instead, defendant CDT Oxford
 16 seeks to apply res judicata defensively, against the very same plaintiff who has already had
 17 an opportunity to litigate the very same claim it now asserts again. *Cf. Masson v. New*
 18 *Yorker Magazine, Inc.*, 85 F.3d 1394, 1400 (9th Cir. 1996) (defensive collateral estoppel
 19 applies “when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff
 20 has previously litigated and lost against another defendant”) (citation omitted).

21 **2. A final judgment.**

22 The August 2005 Order in *Sunnyside I* dismissed Sunnyside’s claims against CDT
 23 Ltd. with prejudice, in response to Opsys’ motion to dismiss under Rules 9(b) and 12(b)(6)
 24 of the Federal Rules of Civil Procedure. “Supreme Court precedent confirms that a
 25 dismissal for failure to state a claim under Rule 12(b)(6) is a ‘judgment on the merits’ to
 26 which res judicata applies.” *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002)
 27 (citing *Federated Dep’t Stores v. Moite*, 452 U.S. 394, 399 n.3 (1981)). “The phrase ‘final
 28 judgment on the merits’ is often used interchangeably with ‘dismissal with prejudice.’” *Id.*

1 at 956 (citations omitted). Hence, the August 2005 Order is a final judgment for purposes
 2 of claim preclusion.

3 **3. Identity of claims.**

4 The Ninth Circuit considers the following factors:

5 “(1) [W]hether rights or interests established in the prior judgment
 6 would be destroyed or impaired by prosecution of the second action;
 7 (2) whether substantially the same evidence is presented in the two actions;
 8 (3) whether the two suits involve infringement of the same right; and
 9 (4) whether the two suits arise out of the same transactional nucleus of
 facts.”

10 *Int'l Union of Operating Eng'rs-Employers Constr. Indus. Pension, Welfare & Training*
 11 *Trust Funds v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (quoting *Costantini v. Trans*
 12 *World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). “The last of these criteria is the
 13 most important.” *Id.* (quoting *Costantini*, 681 F.2d at 1202 (footnote omitted)).

14 “Whether two events are part of the same transaction or series depends on whether
 15 they were related to the same set of facts and whether they could conveniently be tried
 16 together.” *Id.* (citation omitted). The doctrine of res judicata “is motivated primarily by
 17 the interest in avoiding repetitive litigation, conserving judicial resources, and preventing
 18 the moral force of court judgments from being undermined.” *Id.* at 1430 (internal quotation
 19 marks and citation omitted). “For this reason, res judicata bars not only all claims that were
 20 actually litigated, but also all claims that ‘could have been asserted’ in the prior action.” *Id.*
 21 (citation omitted). The Ninth Circuit has elaborated as follows:

22 Res judicata bars relitigation of all grounds of recovery that were
 23 asserted, *or could have been asserted*, in a previous action between the
 24 parties, where the previous action was resolved on the merits. It is
 immaterial whether the claims asserted subsequent to the judgment were
 actually pursued in the action that led to the judgment; rather, *the relevant*
inquiry is whether they could have been brought.

25 *Tahoe-Sierra*, 322 F.3d at 1078 (quoting *United States ex rel. Barajas v. Northrop Corp.*,
 26 147 F.3d 905, 909 (9th Cir. 1998) (citations omitted)) (emphasis added).

27 In *Karr*, the court held that an action by employee benefit trust funds to recover
 28 accurate payments from an employer arose out of the same transaction as an earlier action

1 by the trust funds to collect delinquent payments for the same time period. 994 F.2d at
 2 1429. The court reasoned, *inter alia*, that the two actions involved overlapping time
 3 periods and that the claim for accurate payments and the claim for delinquent payments
 4 could conveniently have been tried together. *Id.* at 1429-30.

5 Here, Sunnyside's fraudulent conveyance claims arise out of the same transactional
 6 nucleus of facts as Sunnyside's fraud claims in *Sunnyside I*. Both sets of claims arise out of
 7 the transactions in which CDT Ltd. obtained management control of CDT Oxford and then
 8 equity ownership of CDT Oxford and Opsys. In both cases, Sunnyside alleges that
 9 defendants structured these transactions to obtain Opsys' assets without its liabilities, and to
 10 avoid Sunnyside's claim. For example, Sunnyside alleged in its first amended complaint in
 11 *Sunnyside I* that "one of the *SINE QUA NON* conditions which CDT created for the
 12 purchase of Opsys Ltd. was that Opsys Ltd. somehow get rid of its debt burdens owed to
 13 plaintiff under this lease." *Sunnyside I* Dkt. 21 ¶ 11 (RJN Ex. D at 42) (emphasis in
 14 original). Sunnyside also alleged that "defendants...intended all along to pawn off their
 15 debts under the lease on a straw man subsidiary, 'Opsys USA,' which defendants intended
 16 to set up as a straw man *with no viability whatsoever.*" *Id.* ¶ 15 (RJN Ex. D at 44)
 17 (emphasis in original).

18 Now, in *Sunnyside II*, Sunnyside alleges similarly that "Defendants specifically
 19 structured the 2002 transaction in a manner to deprive the California creditors—including
 20 specifically Sunnyside—from obtaining recourse against the assets transferred by Opsys (or
 21 the monies paid by CDT)." Compl. ¶ 12; *see also id.* ¶ 34 ("A substantial purpose of
 22 Opsys's entry into the transaction was to place the Opsys IP out of the reach of Opsys's
 23 California's creditors, including the \$6 million liability to Sunnyside...."). Whether or not
 24 Sunnyside's current causes of action are the same causes of action actually litigated in
 25 *Sunnyside I*, they "could have been asserted" in *Sunnyside I*. *See Karr*, 994 F.2d at 1430.
 26 They involve the same time period and the same series of complex transactions, they could
 27 have been conveniently litigated in *Sunnyside I*, and it would have conserved judicial
 28 resources—as well as those of the parties—to have done so.

1 “Actual knowledge of a potential claim is not a requirement for application of the
 2 rules of merger and bar.” *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986). “For
 3 purposes of res judicata, it is not necessary to ask if the plaintiff knew of his present claim
 4 at the time of the former judgment, for it is the existence of the present claim, not party
 5 awareness of it, that controls.” *Id.* Thus, even if Sunnyside did not know of the May 2005
 6 transaction before entry of the August 2005 Order, it may not avoid preclusion of its claims
 7 relating to the May 2005 transaction on this basis. Sunnyside claims that “CDT”
 8 fraudulently concealed the May 2005 transaction (Compl. ¶ 53), but as discussed below
 9 (*see* Part III.C), Sunnyside fails even to state a claim for fraud.

10 Finally, it is immaterial whether the other factors considered in determining identity
 11 of claims apply. In *Karr*, the Ninth Circuit held that “[t]he fact that some different evidence
 12 may be presented in this action...does not defeat the bar of res judicata. We have
 13 emphasized that the factors cited in *Costantini* are ‘tools of analysis, not requirements.’”
 14 994 F.2d at 1430 (citation omitted). Furthermore, “[w]e have previously applied the
 15 doctrine of res judicata on the ground that the two claims arose out of the same transaction,
 16 without reaching other factors cited in *Costantini*.” *Id.* (citing cases); *see also Tahoe-*
 17 *Sierra*, 322 F.3d at 1077-78 (considering only whether the two suits at issue arose from the
 18 same transactional nucleus of facts in determining whether claims were identical).

19 For all these reasons, the identity of claims requirement is satisfied. As in *Tahoe-*
 20 *Sierra*, Sunnyside here “has returned to court and filed a new action essentially seeking
 21 relief from the same alleged wrongs it unsuccessfully protested before.” *Id.* at 1078.
 22 Sunnyside’s claims should be dismissed under the doctrine of claim preclusion.

23 **B. Sunnyside’s claims are barred by the doctrine of issue preclusion.**

24 Sunnyside’s claims also are barred by the doctrine of issue preclusion. In its Rule
 25 25(c) Order, RJN Ex. V, this Court already decided *all* the principal issues raised here.
 26 Sunnyside is not entitled to re-litigate those issues now.

27 Issue preclusion applies when an issue is “actually litigated and necessarily decided,
 28 after a full and fair opportunity for litigation, in a prior proceeding.” *Shaw v. Hahn*, 56 F.3d

1 1128, 1131 (9th Cir. 1995) (citation omitted). “The party asserting collateral estoppel
 2 [issue preclusion] must first show that the estopped issue is identical to an issue litigated in
 3 a previous action.” *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir.
 4 1997) (internal quotation marks and citation omitted). Issue preclusion requires a final
 5 judgment on the merits. *Id.* (citation omitted). The doctrine applies “not only against
 6 actual parties to prior litigation, but also against a party that is in privity to a party in
 7 previous litigation.” *Id.* (citing *Shaw*, 56 F.3d at 1131). We discuss each of these elements
 8 below, in this order: (1) identity or privity of parties; (2) final judgment; (3) full and fair
 9 opportunity to litigate; and (4) identity of issues.

10 **1. Identity or privity of parties.**

11 Here, the party against whom issue preclusion is asserted—Sunnyside—was a party
 12 to *Sunnyside I*, so the requirement of identity or privity of parties is satisfied.

13 **2. Final judgment.**

14 The requirement of a final judgment is satisfied. In *Steen*, the Ninth Circuit held
 15 that the determination of an issue on a motion for summary judgment is sufficient to satisfy
 16 the requirement that an issue actually have been litigated. 106 F.3d at 912. This Court
 17 applied the standards governing summary judgment motions to Sunnyside’s Rule 25(c)
 18 Motion. Rule 25(c) Order at 9 (citing *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*,
 19 13 F.3d 69, 72-73 (3d Cir. 1993), and its holding that “where a Rule 25(c) decision
 20 ‘effectively imposes liability,’ the court should conduct an evidentiary hearing unless the
 21 standards for summary judgment have been met”), 17 (“In light of the weakness of
 22 plaintiff’s arguments, however, and the undisputed facts in the record, the court holds as a
 23 matter of law that CDT, Inc. is not a proper defendant in this action.”), RJN Ex. V at 317,
 24 325. Moreover, the Rule 25(c) Order, like a final judgment on the merits, was final and
 25 immediately appealable (and was immediately appealed). *See Sunnyside Dev. Co. v. Opsys*
 26 *Ltd.*, No. 07-16773 (9th Cir.).

27 **3. Full and fair opportunity to litigate.**

28 The requirement of a “full and fair opportunity” to litigate an issue is also satisfied.

1 In determining this, the courts have considered whether there are procedural opportunities
 2 available in the second action that were not available in the first that might cause a different
 3 result, and whether the party had sufficient incentive litigate the issue fully and vigorously
 4 in the first action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979).

5 Sunnyside has had ample procedural opportunities to pursue its fraud claims in
 6 *Sunnyside I*. On appeal from the Rule 25(c) Order, Sunnyside has complained that it was
 7 not permitted discovery and an evidentiary hearing. But Sunnyside *chose* to proceed by
 8 motion rather than filing a new action. And it was *Sunnyside* who asked this Court to
 9 decide its motion summarily, requesting discovery and an evidentiary hearing only in the
 10 alternative. Rule 25(c) Motion at 22:8-10, 22:18-19, 23:15-18 (*Sunnyside I* Dkt. 179; RJD
 11 Ex. M at 134-35). Midway through the hearing on its Rule 25(c) Motion, Sunnyside
 12 changed course and pushed for further proceedings, but only after it became apparent that
 13 the Court might deny the motion. Even then, Sunnyside did not specify what discovery it
 14 sought. *Sunnyside I* Dkt. 218, at 51 (RJD Ex. U at 286). Furthermore, Sunnyside *did* take
 15 discovery of the transactions at issue. Sunnyside demanded, for example, documents
 16 relating to the 2002 transaction and obtained a court order compelling their production.
 17 *Sunnyside I* Dkt. 68-70 (RJD Exs. I-K).¹ In any event, this Court denied the Rule 25(c)
 18 Motion without allowing further discovery only after finding that there were no genuine
 19 issues of material fact. Rule 25(c) Order at 17, RJD Ex. V at 325. As a result, there is no
 20 reason to believe that any procedural differences between *Sunnyside I* and *Sunnyside II*
 21 would cause a different result.

22

23

24 ¹ Sunnyside's second amended complaint devotes more than a page to allegations
 25 about the acquisition (as had the first amended complaint). *Sunnyside I* Dkt. 21 (RJD Ex. D
 26 at 42-45), Dkt. 58, at 7-8. In deposition, Sunnyside questioned Opsys' witnesses
 27 extensively about the transactions, focusing both on documents produced by Opsys and
 28 reports filed with the SEC. Sunnyside asked its accounting expert, Paul Ainslie, to analyze
 the information it had obtained about Opsys' acquisition and to opine on whether the
 acquisition had increased Sunnyside's damages. *Sunnyside I* Dkt. 180 ¶ 2 (RJD Ex. N at
 137).

1 In addition, Sunnyside had every incentive to pursue its fraud claims vigorously in
 2 *Sunnyside I*. It knew when it filed its Rule 25(c) Motion that Opsys had no assets. Rule
 3 25(c) Motion at 11-12 (*Sunnyside I* Dkt. 179; RJN Ex. M at 123-24). It made a tactical
 4 decision to go after CDT Inc., believing that was its best chance of getting paid on its
 5 judgment against Opsys. Nothing has changed since—except that Sunnyside is now on its
 6 third set of lawyers. Because Sunnyside had sufficient procedural opportunities and plenty
 7 of incentive to pursue the fraud claims in its Rule 25(c) Motion, it has already had a full and
 8 fair opportunity to litigate those claims.

9 **4. Identity of issues.**

10 The fourth and final requirement for issue preclusion is identity of issues. The
 11 Ninth Circuit has identified four factors to be considered in determining whether an issue is
 12 identical to an issue previously litigated:

13 (1) Is there a substantial overlap between the evidence or
 14 argument to be advanced in the second proceeding and that advanced in the
 15 first?

16 (2) Does the new evidence or argument involve the application of
 17 the same rule of law as that involved in the prior proceeding?

18 (3) Could pretrial preparation and discovery related to the matter
 19 presented in the first action reasonably be expected to have embraced the
 20 matter sought to be presented in the second?

21 (4) How closely related are the claims involved in the two
 22 proceedings?

23 Steen, 106 F.3d at 912 (citation omitted). Sunnyside here is precluded from re-litigating
 24 both the issue of adequacy of consideration and that of fraudulent intent. As discussed
 25 below, each of these issues was previously litigated.

26 a. **Sunnyside is precluded from re-litigating the issue of adequacy of**
 27 **consideration.**

28 Sunnyside alleges that the transfers of Opsys' assets to CDT Oxford and CDT Ltd.
 29 “were made for less than its [sic] reasonable equivalent value.” Compl. ¶ 68. In its
 30 Rule 25(c) Motion in *Sunnyside I*, Sunnyside claimed that Opsys did not receive adequate
 31 consideration for its assets. *Sunnyside I* Dkt. 179, at 20 (RJN Ex. M at 132). These are the

1 same claim. Sunnyside claimed inadequacy of consideration in *Sunnyside I* to support its
 2 claims that CDT Inc. was a mere continuation of Opsys, that CDT Inc. fraudulently sought
 3 to escape liability for Opsys' debts, and that CDT Inc. should therefore be liable as Opsys'
 4 successor. *Id.* at 131-33. Adequacy of consideration is the "crucial factor" in determining
 5 whether a corporate acquisition constitutes a mere continuation. *Franklin v. USX Corp.*,
 6 87 Cal. App. 4th 615, 625 (2001). This Court ruled that "plaintiff has failed to demonstrate
 7 [inadequate consideration] with respect to *any* of the transactions at issue," this was "fatal"
 8 to Sunnyside's mere continuation claim, and the fraudulent transfer species of successor
 9 liability also did not apply. Rule 25(c) Order at 14-17, RJN Ex. V at 322-25 (emphasis
 10 added). The Court cited specifically to the Uniform Fraudulent Transfer Act (Cal. Civ.
 11 Code §§ 3439 *et seq.*), the same statute under which Sunnyside now brings its first, second,
 12 and third causes of action. See Rule 25(c) Order at 16-17, RJN Ex. V at 324-25; Compl.
 13 ¶¶ 62-87.

14 All four of the factors to be considered in determining whether successive claims
 15 are identical weigh in favor of finding such identity here. If this Court were to reconsider
 16 adequacy of consideration, there would be "substantial overlap" between the evidence and
 17 argument to be advanced in *Sunnyside II* and that advanced in *Sunnyside I*. The same rule
 18 of law is involved in both proceedings to the extent that Sunnyside claimed or claims
 19 inadequacy of consideration to support its fraud claim in both proceedings. If Sunnyside
 20 had demonstrated the existence of genuine issues of material fact and if the parties had
 21 conducted further discovery in *Sunnyside I*, that discovery would have embraced the "the
 22 matter sought to be presented" in *Sunnyside II*. Finally, these are not just "closely related"
 23 claims; they are the same claim. Sunnyside is therefore precluded from re-litigating the
 24 adequacy of the consideration paid for Opsys.

25 b. **Sunnyside is precluded from re-litigating the issue of fraudulent intent.**

26 Sunnyside alleges that Opsys transferred its assets "with actual intent to hinder,
 27 delay or defraud its creditors." Compl. ¶ 79. In its Rule 25(c) Motion in *Sunnyside I*,
 28 Sunnyside alleged that "[t]he transfer of Opsys Limited's [a]ssets to Cambridge [w]as for

1 the [p]urpose of [a]voiding Opsys Limited's [d]ebts, [i]ncluding to Sunnyside." *Sunnyside*
 2 *I* Dkt. 179, at 21 (RJN Ex. M at 133). Again, these are the same claim. Sunnyside alleged
 3 fraudulent intent in *Sunnyside I* as a basis for successor liability. *Id.* This Court squarely
 4 rejected the claim, finding that "[t]here is no indication that Opsys Limited's attempts to
 5 maintain its UK operations by seeking financing from CDT, Inc. was specifically designed
 6 to dodge the liabilities of the US operations." Rule 25(c) Order at 16, RJN Ex. V at 324.

7 In particular, this Court rejected Sunnyside's claim that the May 2005 transfer was
 8 effected with fraudulent intent: "At the time of these transfers, CDT Limited...was a
 9 defendant in this action. [Citation omitted.] An asset transfer between defendants is hardly
 10 an attempt to thwart a plaintiff's ability to collect. These facts do not support a finding of
 11 fraudulent transfer." *Id.* Sunnyside's counsel informed this Court at the initial case
 12 management conference in the present action that Sunnyside's current claims focus on the
 13 May 2005 transfer, not the October 2002 or December 2004 transfers. Tr. of Proceedings
 14 (July 21, 2008) 5:24-6:1, 6:19-20, 7:16-18 (Dkt. 24). Sunnyside's counsel expressly
 15 acknowledged that the Court had already found that there was no fraudulent intent as to this
 16 transfer: "I acknowledge that Your Honor made a statement at the end of the [Rule 25(c)]
 17 opinion, that it did not appear that this transfer was made with an actual intent to defraud."
 18 *Id.* 8:23-25; *see also id.* 11:4-6 ("the prior statement in your decision was that there was not
 19 an actual fraudulent intent in that transfer"). Sunnyside is therefore in no position to
 20 dispute that the issue of fraudulent intent was previously litigated. Furthermore, for all the
 21 reasons discussed above in connection with the issue of adequacy of consideration (*see*
 22 *supra* pp. 11-12), the factors to be considered in determining whether an issue is identical to
 23 an issue previously litigated all weigh in favor of finding that the fraudulent intent issues in
 24 *Sunnyside I* and *Sunnyside II* are identical. It follows that Sunnyside may not re-litigate
 25 fraudulent intent.

26 c. **Because Sunnyside cannot demonstrate either inadequacy of consideration or**
 27 **fraudulent intent, all its claims must be dismissed.**

28 Sunnyside must prove either inadequacy of consideration or fraudulent intent to

1 prevail on each of its six claims. Because it is precluded from re-litigating these issues, all
 2 of Sunnyside's claims—and the Complaint—must be dismissed.

3 Sunnyside's first claim for violation of Civil Code section 3439.05 requires a
 4 showing that a debtor made a transfer or incurred an obligation "without receiving a
 5 reasonably equivalent value in exchange for the transfer or obligation." Cal. Civ. Code
 6 § 3439.05. But Sunnyside is estopped from arguing inadequacy of consideration. This
 7 claim must therefore be dismissed.

8 Sunnyside's second claim for violation of Civil Code section 3439.04(a)(1) requires
 9 a showing that a debtor made a transfer or incurred an obligation "[w]ith actual intent to
 10 hinder, delay, or defraud any creditor of the debtor." Cal. Civ. Code § 3439.04(a)(1). But
 11 Sunnyside is estopped from arguing fraudulent intent. This claim must therefore be
 12 dismissed.

13 Sunnyside asserts in its third claim that it is entitled to "[a]voidance of the transfer
 14 or obligation to the extent necessary to satisfy the creditor's claim." Compl. ¶ 85
 15 (quoting Cal. Civ. Code § 3439.07(a)(1)). Avoidance is not a claim but a remedy. Because
 16 Sunnyside's first and second causes of action must be dismissed, it has no fraudulent
 17 conveyance claims to be remedied. Its third cause of action must therefore be dismissed.

18 Sunnyside asserts in its fourth claim violations of sections 238 and 423 of the UK
 19 Insolvency Act 1986. A claim under section 238 requires a showing of a transaction "at an
 20 undervalue," which is defined as "a gift," a transaction "on terms that provide for the
 21 company to receive no consideration," or a transaction "for a consideration the value of
 22 which, in money or money's worth, is significantly less than the value, in money or
 23 money's worth, of the consideration provided by the company." UK Insolvency Act 1986,
 24 section 238(4). A claim under section 423 also requires a showing of a transaction "at an
 25 undervalue," which is defined in substantially the same way it is defined in section 238.
 26 See UK Insolvency Act 1986, section 423(1). In addition, a claim under section 423
 27 requires a showing that the person who entered into the transaction did so for the purpose
 28 "(a) of putting assets beyond the reach of a person who is making, or may at some time

1 make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in
 2 relation to the claim which he is making or may make.” UK Insolvency Act 1986, section
 3 423(3). But Sunnyside here is estopped from arguing either inadequacy of consideration or
 4 fraudulent intent. Sunnyside’s fourth claim must therefore be dismissed.

5 Sunnyside’s fifth claim for common law fraud is premised on Sunnyside’s
 6 allegation that “Defendants have engaged in fraud *with the purpose of placing Opsys*
 7 *Limited’s assets beyond the reach of its creditors*, all for their personal enrichment.”
 8 Compl. ¶ 100 (emphasis added). Sunnyside’s fraud claim is also premised on its allegation
 9 that “Defendants...fail[ed] to disclose *the lack of consideration* payable in the 2005
 10 transaction.” *Id.* ¶ 101 (emphasis added). Because Sunnyside is estopped from arguing
 11 either inadequacy of consideration or fraudulent intent, Sunnyside’s fifth cause of action
 12 must be dismissed.

13 Sunnyside alleges in its sixth claim that the licensors of the “Opsys IP” hold the
 14 revenues derived from the Opsys IP as a constructive trustee for the benefit of Opsys.
 15 Compl. ¶ 106. This claim rises or falls with Sunnyside’s other causes of action. Since they
 16 must be dismissed, so too must this claim.

17 **C. Sunnyside’s fraud claim must be dismissed.**

18 **1. Sunnyside’s fraud allegations fail to state a claim.**

19 Sunnyside’s fraud claim should also be dismissed because Sunnyside fails to state a
 20 claim upon which relief can be granted. To state a claim, Sunnyside would need to plead
 21 five elements: ““(1) misrepresentation (false representation, concealment, or non-
 22 disclosure); (2) knowledge of falsity (or ‘scienter’); (3) intent to defraud, i.e., to induce
 23 reliance; (4) justifiable reliance; and (5) resulting damage.”” *Bank of the West v. Valley*
 24 *Nat'l Bank of Ariz.*, 41 F.3d 471, 477 (9th Cir. 1994) (citing California law); *see also* Cal.
 25 Civ. Code § 1709 (“One who willfully deceives another with intent to induce him to alter
 26 his position to his injury or risk, is liable for any damage which he thereby suffers.”),
 27 § 1710 (defining “deceit”). Here, Sunnyside alleges only that “CDT” (not CDT Ltd. or
 28 CDT Oxford) failed to announce the May 2005 transaction to the public at the time it

1 occurred. Compl. ¶¶ 53, 80, 101. In May 2005, Opsys transferred its 84% interest in CDT
 2 Oxford to CDT Ltd. Even if Sunnyside had adequately pled a misrepresentation, Sunnyside
 3 does not plead any of the other four required elements.

4 First, Sunnyside does not plead scienter. Sunnyside does not allege that CDT Ltd.
 5 or CDT Oxford had any obligation to disclose the May 2005 transaction, that they knew
 6 they should disclose it, or that they knew that not disclosing it would be misleading.
 7 See Cal. Civ. Code § 1710(3) (the suppression of a fact “by one who is bound to disclose it”
 8 constitutes deceit). Sunnyside claims only that “CDT” was a “publicly traded company
 9 with disclosure obligations.” Compl. ¶ 53. But CDT Inc.—the publicly traded company—
 10 is not a defendant in this action, and neither CDT Ltd. nor CDT Oxford are public
 11 companies. Moreover, Sunnyside’s vague reference to “disclosure obligations” falls short
 12 of alleging that CDT Ltd. or CDT Oxford was bound to disclose the May 2005 transaction
 13 (or that they knew of this obligation). In addition, this Court has already found that the
 14 May 2005 transaction was not motivated by fraudulent intent. At the time, CDT Ltd. was a
 15 defendant in *Sunnyside I*; the Court did not dismiss CDT Ltd. until August 8, 2005.
 16 *Sunnyside I* Dkt. 39 (RJN Ex. F). Thus, the May 2005 transfer was made by a defendant
 17 (Opsys) to another defendant (CDT Ltd.). As this Court found in *Sunnyside I*, “[a]n asset
 18 transfer between defendants is hardly an attempt to thwart a plaintiff’s ability to collect.”
 19 Rule 25(c) Order at 16, RJN Ex. V at 324.

20 Second, Sunnyside does not allege that CDT Ltd. or CDT Oxford intended to induce
 21 reliance by Sunnyside. To satisfy this requirement, Sunnyside would need to allege that
 22 CDT Ltd. or CDT Oxford intended, by concealing the May 2005 transaction, to cause
 23 Sunnyside to take some action—or not to take some action—that would prejudice
 24 Sunnyside’s interests. But Sunnyside has not done so.

25 Third, Sunnyside does not allege justifiable reliance. Sunnyside has not identified
 26 any respect in which it would have acted differently if it had known of the May 2005
 27 transaction in May 2005. In fact, Sunnyside vigorously opposed the motion to dismiss
 28 CDT Ltd. (*Sunnyside I* Dkt. 32; RJN Ex. E) and then moved in a matter of months to add

1 CDT Inc. to the litigation (*Sunnyside I* Dkt. 48; RJN Ex. G).

2 Fourth, although Sunnyside alleges in its fraud count that it “has been injured by
 3 Defendants’ actions” (Compl. ¶ 102), it does not plead any facts to support this naked
 4 allegation. It fails to say how it was damaged by not knowing about the May 2005
 5 transaction sooner, or to identify the damage it allegedly incurred. What Sunnyside really
 6 seeks is to satisfy its judgment in *Sunnyside I* out of the assets conveyed by Opsys to CDT
 7 Oxford and CDT Ltd. Sunnyside’s allegations about the nondisclosure of the May 2005
 8 transfers are superfluous, and they do not state a claim. Sunnyside’s fraud count should
 9 therefore be dismissed.

10 **2. Sunnyside fails to state its fraud claim with particularity.**

11 “In alleging fraud or mistake, a party must state with particularity the circumstances
 12 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Sunnyside’s fifth cause of action for
 13 common law fraud should be dismissed for failure to comply with this requirement if
 14 Sunnyside attempts to rely on allegations other than those discussed above to support its
 15 fraud claim. Sunnyside devotes only four sentences to its fraud claim, one of which simply
 16 alleges injury. Compl. ¶¶ 99-102. This does not satisfy the heightened pleading
 17 requirements of Rule 9(b). “Rule 9(b) ensures that allegations of fraud are specific enough
 18 to give defendants notice of the particular misconduct which is alleged to constitute the
 19 fraud charged so that they can defend against the charge and not just deny that they have
 20 done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). In
 21 *Semegen*, the Ninth Circuit affirmed the dismissal of fraud claims where plaintiffs had
 22 failed to specify any times, dates, places, or other details and did “nothing more than set
 23 forth conclusory allegations...punctuated by a handful of neutral facts.” *Id.*

24 **D. Sunnyside’s claims under the UK Insolvency Act 1986 must be dismissed.**

25 Sunnyside includes a claim for violation of section 238 of the UK Insolvency Act
 26 1986 in its fourth cause of action. But section 238 provides as follows: “This section
 27 applies in the case of a company where—(a) the company enters administration, or (b) the
 28 company goes into liquidation....” Section 238 also provides that, where a company has

1 entered into a transaction at an undervalue, the “office-holder” may apply to the court for an
 2 order. Section 238 defines the “office-holder” as “the administrator or the liquidator, as the
 3 case may be.” These provisions make clear that, when a company has entered
 4 administration or liquidation, section 238 permits the administrator or liquidator to apply
 5 for an order to redress certain transactions. Section 238 does not create a right of action in
 6 a debtor such as Sunnyside. Sunnyside is neither an administrator nor a liquidator and
 7 cannot bring claims under section 238. *See* Dkt. 26 for copies of these UK statutes.

8 Sunnyside also purports to bring a claim under section 423 of the UK Insolvency
 9 Act 1986, but this claim must be dismissed under Rule 12(b)(1) for lack of subject matter
 10 jurisdiction. Section 423 authorizes “the court” to issue orders addressing certain
 11 transactions, but section 423(4) defines “the court” as “the High Court [of England and
 12 Wales]” or, if the person making the transaction “is a body capable of being wound up
 13 under Part IV or V of this Act, any other court having jurisdiction to wind it up.” This
 14 Court is not the High Court of England and Wales. Sunnyside does not allege that this
 15 Court has jurisdiction to wind up any of the defendants in this matter—all of whom are UK
 16 companies. In fact, Sunnyside has hired a solicitor and commenced winding up
 17 proceedings against Opsys in the UK. *See* RJN Ex. W. It seems more than capable of
 18 defending its interests under UK law in the UK courts. In any event, Sunnyside’s fourth
 19 cause of action under the UK Insolvency Act 1986 must be dismissed in its entirety.

20 **E. Sunnyside’s claims based on the 2002 transaction are time-barred, as are its
 21 fraud and constructive trust claims based on the 2004 transaction.**

22 Each and every cause of action asserted by Sunnyside is barred by the applicable
 23 statutes of limitation to the extent it is based on the October 2002 transaction. Furthermore,
 24 Sunnyside’s common law fraud claim and constructive trust claim are barred to the extent
 25 they are based on either the October 2002 transaction or the December 2004 transaction.

26 **1. Sunnyside’s first claim under Civil Code section 3439.05.**

27 A claim under Civil Code section 3439.05 must be brought within four years after
 28 the allegedly fraudulent transfer was made. Cal. Civ. Code § 3439.09(b). The October

1 2002 transaction took place more than four years before the filing of Sunnyside's
 2 Complaint on April 3, 2008. *See* Dkt. 1. Accordingly, Sunnyside's first cause of action is
 3 time-barred to the extent it is based on the October 2002 transaction.

4 **2. Sunnyside's second claim under Civil Code section 3439.04(a)(1).**

5 A claim under Civil Code section 3439.04(a)(1) must be brought within four years
 6 of the allegedly fraudulent transfer or, "if later, within one year after the transfer...was or
 7 could reasonably have been discovered by the claimant." Cal. Civ. Code § 3439.09(a).
 8 Again, the October 2002 transaction occurred more than four years before Sunnyside filed
 9 its complaint on April 3, 2008. Under the second prong of section 3439.09(a), Sunnyside's
 10 claims based on the October 2002 transaction would have been timely if Sunnyside had not
 11 discovered, or could not reasonably have discovered, the October 2002 transaction until
 12 April 3, 2007 (one year before the filing of Sunnyside's complaint). But Sunnyside knew
 13 of the October 2002 transaction well before April 3, 2007. In its initial complaint in
 14 *Sunnyside I*, filed December 14, 2004, Sunnyside alleged that CDT Ltd. owned Opsys.
 15 *Sunnyside I* Dkt. 1, Ex. A ¶ 2 (RJN Ex. A). And, in Sunnyside's first amended complaint
 16 in *Sunnyside I*, filed May 11, 2005, Sunnyside alleged that CDT Ltd. was negotiating to
 17 acquire Opsys by 2002, and that CDT Ltd. did purchase Opsys. *Sunnyside I* Dkt. 21 ¶ 11
 18 (RJN Ex. D at 42). Because Sunnyside did not make its claim under Civil Code section
 19 3439.04(a)(1) within one year after it discovered the October 2002 transaction, it cannot
 20 avail itself of the second prong of section 3439.09(a). Whether under the first or second
 21 prong, Sunnyside's second cause of action is time-barred to the extent it is based on the
 22 October 2002 transaction.

23 **3. Sunnyside's third claim under Civil Code section 3439.07.**

24 In its third cause of action, Sunnyside claims that it is entitled to "[a]voidance of the
 25 transfer or obligation to the extent necessary to satisfy the creditor's claim." Compl. ¶ 85
 26 (quoting Cal. Civ. Code § 3439.07(a)(1)). Although framed as a separate count, this is not
 27 an independent cause of action. Instead, it identifies a remedy sought by Sunnyside for the
 28 violations alleged in its first two causes of action. It necessarily follows—for all the

1 reasons stated in connection with the first two causes of action—that the third cause of
 2 action is time-barred to the extent it is based on the October 2002 transaction.

3 **4. Sunnyside's fourth claim under the UK Insolvency Act 1986.**

4 Sunnyside's purported claim under section 238 of the UK Insolvency Act 1986
 5 should be dismissed because it is time-barred. Section 238 applies where a company has
 6 entered into certain transactions “at a relevant time.” Under section 240, a company enters
 7 into a transaction at a relevant time if the transaction is entered into no earlier than two
 8 years before the “onset of insolvency,” which is defined, depending on the circumstances,
 9 as the date on which an administration application is made, the date on which a copy of a
 10 notice of intention to appoint an administrator is filed with the court, the date on which the
 11 appointment takes effect, or the date of the commencement of the winding up. Here,
 12 Sunnyside petitioned for Opsys to be wound up on January 15, 2008. RJN Ex. W. None of
 13 the 2002, 2004 or 2005 transactions occurred within the two years before January 15, 2008.
 14 Sunnyside's claim under section 238 of the UK Insolvency Act 1986 must therefore be
 15 dismissed.

16 **5. Sunnyside's fifth claim for common law fraud.**

17 The statute of limitations on a fraud claim is three years. Cal. Civ. Proc. Code
 18 § 338(d). The cause of action accrues upon “the discovery, by the aggrieved party, of the
 19 facts constituting the fraud.” *Id.* Thus, Sunnyside's fraud claim is time-barred to the extent
 20 it is based on the October 2002 and December 2004 transactions unless Sunnyside can
 21 show that it did not discover those transactions until April 3, 2005 (three years before the
 22 filing of Sunnyside's Complaint). As discussed above, however, Sunnyside's initial
 23 complaint in *Sunnyside I*, filed on December 14, 2004, alleges that CDT Ltd. owned Opsys.
 24 *Sunnyside I* Dkt. 1, Ex. A ¶ 2 (RJN Ex. A at 7).

25 Furthermore, in Sunnyside's papers opposing Opsys' motion to dismiss, filed
 26 March 21, 2005, Sunnyside claimed that “CDT Limited has purchased the assets of Opsys
 27 Limited” and that Opsys “may have acted as the agent of CDT Limited in shedding its
 28 liabilities and debts as part of the plan to merge the assets of Opsys Limited into CDT

1 Limited and obtain the assets only.” *Sunnyside I* Dkt. 14, at 1, 12 (RJN Ex. B at 20, 31).
 2 These allegations—which closely resemble Sunnyside’s current allegations (*see* Compl.
 3 ¶¶ 12, 32-35)—demonstrate that Sunnyside knew of these transactions well before April 3,
 4 2005.

5 Indeed, Sunnyside’s manager, Frank Chiu, knew of the December 2004 transaction
 6 before it happened. He and Damoder Reddy testified at deposition that Mr. Reddy faxed
 7 Mr. Chiu information about CDT Inc.’s planned IPO in November 2004; Mr. Reddy
 8 suggested that Mr. Chiu file suit and referred him to an attorney. *Sunnyside I* Dkt. 206 &
 9 206-2 (RJN Ex. R at 194-96, 198, 201-04). Because Sunnyside knew of both the October
 10 2002 and December 2004 transactions before April 3, 2005, its fraud claim is untimely and
 11 must be dismissed.

12 **6. Sunnyside’s sixth claim for a constructive trust.**

13 In its final claim, Sunnyside alleges that the licensors of the “Opsys IP” hold the
 14 revenues derived from the Opsys IP as a constructive trustee for the benefit of Opsys.
 15 Compl. ¶ 106. The three-year statute of limitations applicable to fraud claims applies to
 16 this claim as well. “The three-year limitation [on fraud claims] applies to all such actions
 17 whether the relief demanded be legal or equitable.” *Douglas v. Douglas*, 103 Cal. App. 2d
 18 29, 32 (1951). In *Douglas*, the court affirmed the dismissal of a constructive trust claim
 19 brought more than three years after the alleged fraudulent transfer and the plaintiff’s
 20 discovery thereof. *Id.* at 32. Hence, for all the reasons stated in connection with
 21 Sunnyside’s fifth claim, Sunnyside’s sixth claim is time-barred to the extent it is based on
 22 the October 2002 or the December 2004 transactions.

23 Sunnyside also cites California Code of Civil Procedure section 708.210 in its sixth
 24 claim. Compl. ¶ 107. This statute permits the filing of an action by a creditor against a
 25 third party who has “possession or control of property in which a judgment debtor has an
 26 interest.” Such an action must be commenced before “[t]he time when the judgment debtor
 27 may bring an action against the third person concerning the property or debt.” Cal. Civ.
 28 Proc. Code § 708.230(a)(1). Even if section 708.210 allows a creditor to proceed against a

1 third party in federal court, it does not apply here. Sunnyside does not allege that Opsys
 2 claims an interest in any assets transferred to CDT Oxford or CDT Ltd. Nor does
 3 Sunnyside describe what type of interest this might be, or when the time to assert this
 4 interest might expire. Accordingly, Sunnyside's invocation of section 708.210 does not
 5 increase the limitations period applicable to its sixth claim.

6 **IV. CONCLUSION.**

7 For the foregoing reasons, CDT Ltd. submits that this action should be dismissed
 8 with prejudice.

9 Dated: July 28, 2008.

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